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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE HERMOSILLO,

Defendant and Appellant.

B267531

(Los Angeles County
Super. Ct. No. KA106629)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Thomas C. Falls, Judge. Affirmed.

Edward H. Schulman, under appointment by the
Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A.
Engler, Chief Assistant Attorney General, Lance E. Winters,
Senior Assistant Attorney General, Michael R. Johnsen and
Alene M. Games, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

A jury convicted Jose Hermosillo of attempted sexual penetration with a child 10 years of age or younger (Pen. Code §§ 288.7, subd. (b), 664),¹ committing a lewd or lascivious act on a child under the age of 14 by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury (§ 288, subd. (b)(1)), and committing a lewd or lascivious act on a child under the age of 14 (§ 288, subd. (a)). The victim, B.D., was Hermosillo's great-niece.

Hermosillo does not challenge his conviction for committing a lewd act on a child, but he contends the evidence was insufficient to support the jury's verdict that he used force. He asks this court to modify the conviction on the count for forcibly committing a lewd act on a child to a conviction for committing a lewd or lascivious act on a child without force, and to remand the case for resentencing. Because we conclude there was substantial evidence that Hermosillo committed a lewd act on his victim using force, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *B.D. Visits Relatives with Her Grandmother*

On July 9, 2014 nine-year-old B.D. and her grandmother ran some errands and visited the grandmother's sister, Leonila Hermosillo, at her home. Leonila is married to Hermosillo, and they have four adult children. B.D. had met Leonila and Hermosillo a few times before, but she did not know them well.

¹ Statutory references are to the Penal Code.

After they arriving at the house, B.D. had lunch with her grandmother and Leonila; Hermosillo took his plate into another room. Later, one of Hermosillo's daughter came over with her three-year-old daughter, Victoria. B.D. and her cousin Victoria played in the living room with puzzles until they got bored. Leonila sent the girls to a bedroom to watch television. When the children had trouble operating the channels, Leonila asked Hermosillo to help them.

B. *Hermosillo Sexually Assaults B.D.*

While B.D. and Victoria sat on the edge of the bed in the bedroom, Hermosillo tried to find a children's channel on the television. He found a cooking show and then sat down on the bed between B.D. and Victoria. Victoria stood up on the bed to play. She pushed her grandfather's shoulders so he would fall backwards on the bed. Hermosillo pushed Victoria down on the bed and then used his left arm to push B.D. down. After they all sat back up, Victoria stood up on the bed and pushed her grandfather down again. Hermosillo then pushed B.D. down again. When B.D. tried to get up to fix the television, Hermosillo held her down by her arm so she could not get up. While B.D. was lying on her back on the bed, Hermosillo put his hand under her back, on top of her clothes, and slowly moved his hand down until he was rubbing her "butt." B.D. felt "shocked" and was "stiff like [she] couldn't move," "like a statue."

B.D. was wearing shorts and a shirt that day. After rubbing her butt on top of her shorts, Hermosillo put his hand inside her shorts and moved it closer to her "private part." B.D. testified, "I was stiff. I couldn't move. I wanted to do something, but I kept thinking to myself, if I did something, maybe something would happen or something, but I got -- I was scared

that I stayed stiff.” Then Hermosillo put his fingers inside B.D.’s vagina. B.D. testified that it hurt a lot and felt like “pinching.” She tried to move away by moving her legs to the edge of the bed, but Hermosillo “scooted” towards her and prevented her from moving by pushing her arm down. Victoria was in the room playing and watching television at the time. When Hermosillo took his fingers out of B.D.’s vagina, she sat up, and Hermosillo left the room.

Hermosillo’s grandson, who was about the same age as B.D., came over later in the day, and all three children played outside for a while. Then the children came back inside and watched a children’s movie in a different bedroom. All three children were on the bed watching the movie when Hermosillo entered the room. Hermosillo’s grandson left the room, and Hermosillo moved closer to B.D. on the bed. Hermosillo put his hand up B.D.’s shorts and again put his fingers in her vagina. B.D. testified that it hurt more than it had the first time because “he was sticking his nails into [her] private part.” Victoria left the room to get an ice pop, and when she returned she dropped it on the bedroom floor. At that point, Hermosillo removed his fingers from B.D.’s vagina to get up and clean the ice pop off the floor. Hermosillo’s grandson came back into the room, and Hermosillo fell asleep on the bed.

Hermosillo’s grandson left the room again to get something to eat. When Hermosillo woke up, he again put his fingers in B.D.’s vagina. B.D. told him she had to go to the bathroom, and Hermosillo removed his hand from inside her shorts. B.D. went into the bathroom and checked her vagina because “his nails were long” and she “thought if [she] checked [herself] it would be the right thing to do.” Her vagina was red and throbbing. B.D.

testified that when she got up to go into the bathroom she was so scared she “marked” her underwear with fecal matter.

Hermosillo left the room when Leonila told him to go to the store to pick up food for the family. B.D. and Victoria continued to watch the children’s movie until approximately 5:00 p.m., when B.D.’s grandmother told B.D. it was time to leave. In the car on the way home, B.D.’s grandmother asked B.D. if she had a good time. B.D. did not reply. She just closed her eyes.

C. *B.D. Tells Her Mother About Her Uncle’s Conduct*

B.D.’s mother arrived home from work at 7:30 p.m. that evening. B.D. told her mother that Hermosillo had touched her in an inappropriate way. B.D. showed her mother where on her body he had touched her, and she told her mother that he touched her over her clothes and under her clothes on her “buttocks” and on her “pee-pee.” B.D. said Hermosillo put his fingers in her “private part” and hurt her with his long nails. Her mother looked at B.D.’s vagina and saw that it was red. When her mother saw the fecal matter stain in B.D.’s underwear, B.D. explained that she soiled herself when she tried to leave the bedroom because she was so scared.

D. *A Forensic Nurse Conducts Sexual Assault*

Examinations of B.D. and Hermosillo

B.D.’s mother immediately drove B.D. to the police station where she made a report. The police escorted B.D. and her mother to the hospital where Carey Zuniga, a forensic nurse who performs sexual assault examinations, examined B.D. just after midnight on July 10, 2014. Zuniga first interviewed B.D. to obtain some medical background and an account of the

molestation. Zuniga then swabbed various areas of B.D.'s body for evidence of a sexual assault, placed the swabs in a sealed sexual assault kit envelope, and gave the evidence to the police. Zuniga also examined Hermosillo at 3:20 a.m. She took a medical history from him and conducted a physical examination, also swabbing various areas of his body. She provided his sexual assault kit to the police.

E. *The Police Interview Hermosillo and B.D.*

On July 10, 2014 Detective Janet O'Bryan of the Los Angeles County Sheriff's Department conducted a recorded interview with Hermosillo. Hermosillo admitted that he "los[t] control" and put his finger in B.D.'s vagina two times. He stated that he was sorry and wanted to apologize. When Detective O'Bryan suggested he write a letter of apology, he agreed.

On July 11, 2014 Veronica Cardoza, a forensic investigator, interviewed B.D. at the Children's Advocacy Center. B.D. told Cardoza that she went to her uncle's house with her grandmother and that her uncle touched her while he was helping Victoria and her with the television. B.D. told Cardoza that Hermosillo was playing with Victoria on the bed, that Victoria pulled him down and then he pulled her down. She said: "I was trying to get up, but he wouldn't let me, like he was holding my hand not to let me up." B.D. explained to Cardoza: "I was holding on the bed trying to move myself but he used one hand for both of them and [held] my arm . . . so I used my other hand to kind of move, but every time I would he just pulled me back. . . . He was using his right hand to touch me and the left hand he was holding my hand I tried to, like, move, but every time I did he [unintelligible] in me, and I had another plan to just go forward but every time I

did he pushed me back.” To prevent B.D. from moving away from him, Hermosillo also held her shoulder and pushed her down.

F. *The Jury Convicts Hermosillo*

At trial the prosecution called B.D., her mother, and her grandmother to testify about the events of July 9, 2014. Cardoza, who interviewed B.D. the day after the assault, did not testify, but the prosecution without objection played the video recording of the interview. Detective O’Bryan testified about her interview of Hermosillo, and the prosecution played the recording of that interview for the jury. The prosecution also introduced Hermosillo’s letter of apology.

Zuniga testified that the sexual assault examination she conducted of B.D. was consistent with the history B.D. had provided, but Zuniga could not confirm or rule out a sexual assault. Zuniga explained that a normal examination is not unusual when a child reports an assault that includes vaginal penetration. Christine Sage, a criminalist who examined the sexual assault kits, testified that she analyzed the swabs from the kits and found a mixture of DNA of B.D. and Hermosillo on the swabs of B.D.’s belly button and right inner thigh. The chance that the DNA profile belonged to a person other than Hermosillo was one in 173 trillion.

A number of witnesses testified on behalf of Hermosillo. Leonila testified that she and Hermosillo had been married for 40 years, he always interacted well with children, and she did not see her husband touch B.D. that day. Jesus Adame, Hermosillo’s friend for 25 years, testified that their families and children were close and he had never observed Hermosillo engage in any inappropriate behavior with the children. Two of Hermosillo’s

daughters and his son testified that their father had always acted appropriately with children.

The jury found Hermosillo not guilty of sexual penetration of a child, but guilty of the lesser included offense of attempted sexual penetration of a child. The jury also found Hermosillo guilty of committing a forcible lewd act on a child and committing a lewd act on a child.

The trial court sentenced Hermosillo to an aggregate prison term of 14 years. The court imposed the middle term of eight years on count 2, committing a lewd or lascivious act on a child by use of force, and a consecutive middle term of six years on count 3, committing a lewd or lascivious act on a child. The court found that “the sex crimes occurred on two separate occasions” and that, although the court considered the offenses alleged in count 1 and 2 “to be one act” and part of an “indivisible course of conduct,” the offense in count 3 was independent because it occurred after Hermosillo and B.D. had separated. The court noted that the evidence on this crime was that “the victim, after what appears to be a fairly lengthy period of time, went into a completely different room other than the room she was originally molested in,” and Hermosillo “chose to enter into that second room and molest the victim a second time.” The court stated it “fully recognize[d]” it had discretion to impose consecutive sentences under section 667.6, subdivision (c), for count 2 and count 3 (see footnote 2), and was choosing to impose consecutive sentences. On count 1, attempted sexual penetration, the court imposed the upper term of nine years and stayed execution of that term pursuant to section 654. Hermosillo timely appealed.

DISCUSSION

A. *Standard of Review*

Hermosillo argues that there is no substantial evidence to support his conviction for committing a lewd or lascivious act on a child by use of force, as opposed to without force.² In evaluating this argument, “we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the

² Hermosillo contends that because neither attempted sexual penetration nor committing a lewd act on a child without force is an enumerated offense in section 667.6, subdivision (e), reduction of his conviction for forcible lewd conduct to non-forcible lewd conduct would mean that “full term consecutive sentencing as otherwise provided for in section 667.6, subdivisions (c) and/or (d) [would be] unauthorized.” (See § 667.6, subd. (c) “[i]n lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion,” and “[a] term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)”; § 667.6, subd. (d) “[a] full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions”]; *People v. Leal* (2004) 33 Cal.4th 999, 1012 [“a conviction under [section 288, subdivision (b)(1)] triggers the provisions of . . . section 667.6, subdivisions (c) and (d), which permit the trial court to impose full-term consecutive sentences under certain circumstances”].)

defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] “Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” [Citation.] A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’ the jury’s verdict.” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87; accord, *People v. Zamudio* (2008) 43 Cal.4th 327, 357; see *People v. Garcia* (2016) 247 Cal.App.4th 1013, 1019.)

B. *There Was Substantial Evidence To Support
Hermosillo’s Conviction for Committing a Lewd Act
on a Child by Use of Force*

Section 288, subdivision (a), provides: “[A]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.” Section 288, subdivision (b)(1), provides: “Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful

bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years.” Thus, “[s]ection 288, subdivision (b)(1), permits more severe punishment for certain aggravated acts of lewd conduct on a child under the age of 14 years—those committed by force, violence, duress, menace, or fear.” (*People v. Leal* (2004) 33 Cal.4th 999, 1012.)

“Force in this context, means physical force that is “substantially different from or substantially greater than that necessary to accomplish the lewd act itself.”” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005 (*Alvarez*); see *People v. Garcia, supra*, 247 Cal.App.4th at p. 1024 [“[a] defendant uses “force” if the prohibited act is facilitated by the defendant’s use of physical violence, compulsion or constraint against the victim other than, or in addition to, the physical contact which is inherent in the prohibited act”].) For example, the court in *Alvarez*, agreeing with the majority of courts that had addressed the issue, held that “acts of grabbing, holding and restraining that occur in conjunction with the lewd acts” are sufficient to support a finding that the lewd act was committed by means of force. (*Alvarez, supra*, 178 Cal.App.4th at p. 1005; see *Garcia, supra*, 247 Cal.App.4th at p. 1024.) The court in *Alvarez* stated that the defendant’s actions of resisting the victim’s attempts to push him away when he attempted to kiss her, holding her while he digitally penetrated her, and continuing to put her hand on his penis whenever she moved it away were sufficiently distinct from the lewd conduct to constitute use of force. The court concluded this evidence supported the defendant’s conviction for committing a forcible lewd act on a child by force. (*Alvarez, supra*, at p. 1005.)

The evidence was similarly sufficient in this case. B.D. told Cardoza that she tried to get up but Hermosillo prevented her from doing so, and that when she tried to get away Hermosillo grabbed her arm and pulled her back toward him. B.D. told Cardoza that Hermosillo was using one hand to touch her and the other hand to hold onto her, and that he held her shoulder and pushed her down on the bed. B.D. testified at trial that Hermosillo pushed her down by her arm so she could not get up. She also testified that she tried to move her legs to the edge of the bed, but Hermosillo “scooted” towards her and stopped her from moving away. Hermosillo’s actions of preventing B.D. from escaping and his efforts to overcome her resistance were “substantially different from that necessary to accomplish the lewd acts.” (*Alvarez, supra*, 178 Cal.App.4th at p. 1005.) Therefore, there was substantial evidence of the type of force necessary to support a conviction for committing a lewd act on a child by force. (See *People v. Garcia, supra*, 247 Cal.App.4th at p. 1024 [the defendant’s acts of grabbing the victim’s hands to keep her from moving while he touched her vagina and holding her on the floor with his body while he placed his penis on her vagina supported conviction for forcible lewd conduct]; *Alvarez, supra*, at p. 1005 [evidence supported conviction for forcible lewd conduct where “[a]ll that was necessary to commit [the lewd] act was a lewd touching” and the defendant’s “application of force . . . was substantially different, regardless of whether it was substantially greater”].)³

³ Hermosillo asserts that the force he used “was directed at both Victoria and B.D. as part and parcel of their horseplay; it had nothing to do with any inappropriate touching of B.D.” This assertion disregards B.D.’s statements to Cardoza and B.D.’s trial testimony describing how Hermosillo prevented her from

Citing *People v. Senior* (1992) 3 Cal.App.4th 765, 774 (*Senior*), Hermosillo argues that the force required for forcibly committing a lewd act on a child “is *not* that measure of physical control which frequently accompanies the acts complained of, for ‘a modicum of holding and even restraining’ does not constitute substantially different or excessive force.” California courts, however, have uniformly rejected this part of the court’s opinion in *Senior*. For example, in *People v. Babcock* (1993) 14 Cal.App.4th 383 the court stated that the “fatal flaw” in the *Senior* court’s analysis was an “improper attempt to merge the lewd acts and the force by which they were accomplished,” and that “we do not believe that grabbing the victims’ hands and overcoming the resistance of an eight-year-old child are necessarily elements of the lewd acts of touching defendant’s crotch.” (*Id.* at p. 388.) In *People v. Neel* (1993) 19 Cal.App.4th 1784 the court disagreed with *Senior* and with a case on which *Senior* relied, *People v. Schulz* (1992) 2 Cal.App.4th 999, and held that the “defendant’s acts of forcing the victim’s head down on his penis when she tried to pull away and grabbing her wrist, placing her hand on his penis, and then ‘making it go up and down’ constitute force within the meaning of [section 288,] subdivision (b).” (*People v. Neel, supra*, 19 Cal.App.4th at p. 1790.)

Even the Sixth Appellate District, which decided *Senior*, has since rejected the *Senior* court’s interpretation of the type of force required for a conviction of forcible lewd conduct on a child. In *People v. Bolander* (1994) 23 Cal.App.4th 155, disapproved on other another ground in *People v. Soto* (2011) 51 Cal.4th 229,

escaping by holding her arm, hands, and shoulder while she was too afraid to move and while Victoria ran around the room playing and watching television.

241, fn. 12, the court rejected *Senior*, stating that, “in light of convincing criticisms set forth in *Babcock* and *Neel*, we respectfully disagree with the interpretation of the ‘force’ requirement of section 288, subdivision (b) discussed in *Schulz* and *Senior*. We instead join those courts which have held that ‘[i]n subdivision (b), the element of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person is intended as a requirement that the lewd act be undertaken without the consent of the victim. [Citation.] As used in that subdivision, “force” means “physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.”’” (*People v. Bolander, supra*, 23 Cal.App.4th at pp. 160-161.) Hermosillo used such force.

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

KEENY, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.